No. 17-1042

IN THE

Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

MICHAEL D. LOOS,

Respondent.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. This motion is filed pursuant to Rule 37.2(b). As required by Rule 37.2(a), counsel for AAR has timely notified the parties of AAR's intent to file this brief. Petitioner has consented to AAR's filing of a brief.[1] Respondent has not consented.

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads, Amtrak, and some smaller freight railroads and

[1] The letter expressing consent has been filed with the Clerk of the Court.

commuter authorities. AAR seeks leave to file a brief *amicus curiae* only when the case presents an issue of great significance to the railroad industry as a whole, and in those instances such requests have been granted.[2]

This case involves the interplay between two federal statutes that are unique to the railroad industry: the Federal Employers' Liability Act (FELA) and the Railroad Retirement Tax Act (RRTA). Each year, railroads are defendants in hundreds of lawsuits filed under FELA, a federal negligence statute that takes the place of workers' compensation in the railroad industry. Railroads also pay a significant amount of taxes each year under the RRTA, a statute which funds benefits paid to railroad retirees, their spouses and survivors under the railroad retirement system.

AAR works closely with its member railroads on a host of issues arising under FELA. AAR also works closely with its members and the Railroad Retirement Board—the federal agency that administers the railroad retirement system—on tax matters arising under the RRTA. Therefore, AAR is in a position to provide the Court with a broad, industry-wide perspective on the issue before the Court. AAR's purpose in filing a brief is to demonstrate how the issue before the Court impacts, not just to Petitioner, but railroads nationwide, and why it is important to the entire railroad industry that this Court provide guidance on this issue.

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[2] *E.g.*, *Bolen v. BNSF Ry.*, 136 S. Ct. 1660 (2016); *CSX Transp., Inc. v. Hensley*, 556 U.S. 838 (2009); *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158 (2007).

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads, many smaller freight railroads, Amtrak, and some commuter authorities.[1] AAR's members operate approximately 83 percent of the rail industry's line haul mileage, produce 97 percent of its freight revenues, and employ 95 percent of rail employees. In matters of significant interest to its members, AAR frequently appears on behalf of the railroad industry before Congress, the courts and administrative agencies. AAR seeks to participate as *amicus curiae* to represent the views of its members when a case raises an issue of importance to the rail industry as a whole.

This case meets the criterion for AAR *amicus* participation because there is a conflict among lower courts that affects two federal statutes that apply uniquely to the railroad industry: the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60; and the Railroad Retirement Tax Act (RRTA), 26 U.S.C. §§3201-3241. These statutes affect all railroads, and involve the expenditure of significant sums of money: the payment of hundreds of millions of dollars in settlements and verdicts under FELA, the payment of billions of dollars in taxes under the RRTA, and the billions of dollars in benefits provided under the Railroad Retirement Act (RRA). 45 U.S.C. §§231–231v.

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[1] AAR states that no person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

AAR works closely with its members to ensure consistent and correct application of FELA around the country. Similarly, AAR works with its members and the Railroad Retirement Board—an independent agency in the executive branch of the federal government charged with administering the RRA—to ensure that the railroad retirement system is administered in an equitable and efficient manner, and in accordance with the requirements of the law.

SUMMARY OF THE ARGUMENT

This case presents the question of whether certain damage awards made under FELA are subject to payroll taxes levied under the RRTA. Under FELA, railroad employees who are injured on the job can seek damages from their employer for, among other things, wage loss suffered when they miss time from work due to the injury (so called "time lost" awards). Railroad employees also are eligible for retirement and other benefits under the RRA. These benefits are funded by RRTA payroll taxes levied on the compensation paid by railroad employers and received by railroad employees. When an employee collects a time lost award under FELA, the Internal Revenue Service considers that payment to be compensation and requires railroads to collect and pay both the employer and employee shares of the RRTA payroll taxes.

Notwithstanding the Government's position, there is a split among lower courts over whether RRTA taxes are applicable to FELA time lost awards. The court below held they are not, because FELA time lost awards do not meet the RRTA definition of compensation, which is "any form of money remuneration paid to an individual for services rendered as an employee to one of more employers." The court held that because FELA time lost awards are made for periods when the

employee was not working, they are not in payment for services rendered. The Missouri Supreme Court also has held that FELA time lost awards are not subject to RRTA payroll taxes. The Supreme Courts of Iowa and Nebraska, and a Pennsylvania intermediate appellate court, have held they are.

As a result, many railroads are now subject to irreconcilably inconsistent rulings in states where they operate. This split is likely to widen, as the issue is now pending in appellate courts in two states where multiple large railroads operate.

This issue has implications beyond FELA time lost awards. If FELA time lost awards are not subject to RRTA taxes because they are payments for time periods during which services were not actually rendered, the same logic might call into question whether other payments to employees for time periods during which services were not rendered—like vacation, holiday, and sick pay—are subject to RRTA taxes. In 2016, such payments amounted to about $1.9 billion, a sum that dwarfs FELA time lost awards.

ARGUMENT

I. THE UNCERTAINTY CREATED BY THE DECISION BELOW AND OTHER LOWER COURT DECISIONS ABOUT THE APPLICATION OF TWO IMPORTANT FEDERAL STATUTES REQUIRES GUIDANCE FROM THIS COURT.

This case concerns the interplay between two federal statutes that are unique to the railroad industry: FELA and the RRTA. FELA is a federal negligence law which provides compensation to employees who are injured on the job. The RRTA levies taxes that fund benefits under the RRA, a statute which created and

governs the retirement security system that applies only to railroad employees.

A. Railroad Workers Who Are Injured on the Job May Collect Damages for Lost Wages Under the Federal Employers' Liability Act.

FELA was enacted over a century ago, predating the modern no-fault workers' compensation laws which became universal for the rest of U.S. industry in the decades after FELA's enactment. *See* General Accounting Office, *Federal Employers' Liability Act: Issues Associated with Changing How Railroad Work-Related Injuries Are Compensated* 15 (1996).[2] Congress incorporated into FELA the concept of common law negligence as the basis for recovery. 45 U.S.C. §51; *New Orleans & N. E. R.R.*, 247 U.S. 367, 371 (1918) ("negligence is essential to recovery"); *Southern Ry. Co. v. Gray*, 241 U.S. 333, 339 (1916) (The rights and obligations under FELA depend upon "applicable principles of common law. . . . Negligence by the railway company is essential to a recovery.").

When a railroad employee is injured on the job, unless the parties can reach a settlement the employee must bring a lawsuit in state or federal court in order to recover. 45 U.S.C. §56 (granting state and federal courts concurrent jurisdiction in FELA cases). In these FELA lawsuits, injured workers may seek both economic and noneconomic damages. *See Frazier v. Norfolk & W. Ry. Co.*, 996 F.2d 922, 925 (7th Cir. 1993).

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[2] The maritime industry, by virtue of the Jones Act, also is covered by the FELA. 46 U.S.C. §30104. Virtually all other employers and employees in the United States are covered by a state or federal no-fault workers' compensation law.

Damage claims for past and future lost wages [illegible] are a major component of a FELA suit. During the past three years, railroads reported to the Federal Railroad Administration an annual average of 2,863 on-duty injuries resulting in time away from the job. http://safetydata.fra.gov/OfficeofSafety/publicsite/Query/casemp.aspx (data for 2017 includes only the first eleven months of the year). Not surprisingly, many of the hundreds of FELA suits filed against railroads each year seek recovery for wage loss incurred when the employee was unable to work due to the injury. In cases where damage awards for time lost are made, conflicting decisions among several courts, including the court below, have created confusion over whether those awards are subject to payroll taxes levied under the RRTA.

B. Railroad Employees are Eligible for Railroad Retirement Benefits Which are Funded by Payroll Taxes Levied on Their Compensation Under the RRTA.

Railroads and their employees are not covered by the Social Security system that covers virtually all other employers and employees (and self-employed individuals) in the United States. Instead, they are covered by the RRA, a retirement security system that was enacted around the same time as Social Security. *See* R.R. Ret. Bd., *Railroad Retirement Handbook* 1-2 (2015) (available at https://www.rrb.gov/Sites/default/files/2017-04/RRB%20Handbook%20%282015%29.pdf). The RRA provides retirement and disability benefits to railroad workers, their spouses and survivors.

The RRA provides two tiers of benefits: tier I benefits are essentially equivalent to benefits provided under the Social Security system, but are based on railroad retirement age and service requirements; tier

II provides additional retirement benefits, above and beyond what Social Security provides, that are comparable to private multiemployer pension plans. Tier II also provides other benefits not available under Social Security. *See e.g.*, 45 U.S.C. §231a(a)(1)(iv) (providing an occupational disability benefit); *see generally Railroad Retirement Handbook*, at 15-20. Eligibility requirements under the RRA differ from Social Security, and in some cases are more favorable to long–term railroad employees. *See e.g.*, 45 U.S.C. §231a(a)(1)(ii) (permitting workers aged 60 with at least 30 years of service to retire with an unreduced benefit).

The substantial sums paid in railroad retirement benefits each year require a reliable funding source. At the end of fiscal 2016, 222,100 age and disability annuities, 145,900 spousal annuities, and 116,800 survivor annuities were being paid. R.R. Ret. Bd., *2017 Annual Report* 4 (available at https://www.rrb.gov/sites/default/files/2017-09/2017AnnualReport.pdf). In fiscal year 2016, about $12.3 billion in retirement benefits was paid to those beneficiaries. *Id.* at 1, 15. Payroll taxes levied under the RRTA are the primary source of funding of these benefits, *Railroad Retirement Handbook,* at 45, accounting for $5.9 billion in 2016. *2017 Annual Report,* at 11.

The RRTA imposes separate payroll taxes on "compensation" paid by railroad employers and received by railroad employees to fund each tier of benefits. 26 U.S.C. §3201(a) & (b) (imposing tier I and tier II payroll tax on compensation received by employees); 26 U.S.C. §3221(a) & (b) (imposing tier I and tier II payroll tax on compensation paid by employers). Compensation is defined as "any form of money remuneration paid to an individual for services

rendered as an employee to one of more employers." 26 U.S.C. §3231(e)(1).

Tier I taxes are the equivalent of the Social Security payroll taxes and fund Social Security-equivalent benefits (as well as Medicare). Tier II payroll taxes fund the benefits that are available to railroad employees but not to Social Security beneficiaries. Tier II taxes have a different earnings base (the maximum amount of earnings that is subject to the tax each year) than tier I taxes, and utilize a different rate for employees and employers, which can fluctuate year to year based on the "average account benefit ratio"—a ratio of fund assets to benefits and expenses. *Railroad Retirement Handbook,* at 46.

The RRTA requires that railroad employers collect the taxes owed by their employees by deducting the proper amounts from the employee's compensation and paying those amounts to the IRS. 26 U.S.C. §3202(a); 26 C.F.R. §31.3202-1(a). The law is clear that the employer has an absolute obligation to pay the taxes to the IRS and not to anyone else. 26 U.S.C. §3202(b); 26 C.F.R. §31.3202-1(e).

The RRB's position is that that obligation applies to pay for time lost. "All compensation under the Railroad Retirement Tax Act (RRTA) is subject to the Tier I and Tier II tax rates . . . This is also true of pay for time lost." R.R. Ret. Bd., *Pay for Time Lost from Regular Railroad Employment*, Form 1B-4, at 8 (06-95). The RRB explains that "[p]ay for time lost is compensation paid by a railroad employer which is creditable under the [RRA] and which is attributable to lost earnings for an identifiable period of absence from active service." *Id.* at 1. In addition, Treasury regulations interpret compensation under the RRTA to include time lost payments. 26 C.F.R. §31.3231(e)-

1(a)(3)-(4).[3] Thus, both the IRS and RRB take the position that time lost payments constitute compensation for the purpose of both calculating benefits and levying taxes, and that railroads must pay RRTA payroll taxes on time lost payments made to employees, including awards made under FELA. *See* Pet. at 6-7.

C. Lower Courts are Split Over Whether Time Lost FELA Awards are Subject to RRTA Payroll Taxes.

While the position of the Government is clear, as Petitioner points out, lower courts are split on the question whether RRTA taxes are owed on time lost awards made under FELA. Pet. at 14-20. The court below held that RRTA taxes are not owed on such awards. Pet. App. 17a – 24a. The Missouri Supreme Court has also so ruled. *Mickey v. BNSF Ry. Co.*, 437 S.W.3d 207 (Mo. 2014).

The reasoning of the court below was that time lost FELA awards are not subject to RRTA taxes because they are not remuneration "for services rendered." Pet. App. 20a. The court reasoned that a time lost award is made for "a period of time during which the employee did not actually render any services." *Id.*

Both the court below and the Missouri Supreme Court in *Mickey* held that FELA awards are not subject to RRTA payroll taxes despite the fact that a time lost award received by an employee is included in the calculation of, and thus will increase, the

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[3] The regulation states that "[t]he term compensation is not confined to amounts paid for active service, but includes amounts paid for an identifiable period during which the employee is absent from active service of the employer . . . ."

employee's RRA benefits—the very benefits that are funded by the RRTA. Time lost awards made to an employee are included in the calculation of that employee's railroad retirement benefits—both for creditable compensation and creditable months of service.[4] Nonetheless, both the *Mickey* court and the court below refused to acknowledge the connection between the benefits paid and the taxes levied to fund those benefits. *Id.* 437 S.W.3d at 214-15.[5] Pet. App. 21a.

In contrast, other courts have recognized the connection between the RRTA and RRA, and the relevance of that connection to the taxability of time lost payments. The Iowa Supreme Court concluded that the RRA and RRTA are "inextricably interconnected because the latter funds the former" and that it is "logical to read these two statutes in harmony to conclude that compensation as used in the RRTA implicitly includes time lost." *Phillips v. Chicago Cent. & Pac. R.R.*, 853 N.W.2d 636, 649 (Iowa 2014). *See also Heckman v.*

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[4] *See* 45 U.S. C. §231a(a)(1) (describing eligibility for both retirement and disability benefits); 45 U.S. C. §231a(b) (describing eligibility for supplemental retirement benefits). "Any month or any part of a month during which an employee performed no active service but received pay for time lost as an employee is counted as a month of service," 20 C.F.R. §210.5(d), and is considered "creditable compensation." 20 C.F.R. §211.3(a). Thus, for the purpose of calculating the benefits for which a railroad worker will become eligible, payment received for time lost (including pay received due to a personal injury) is included in determining both the employee's "years of service," 45 U.S.C. §231(f)(1), and "compensation." 45 U.S.C. §231(h)(1)&(2); 20 C.F.R. §211.2(b)(2).

[5] *Mickey* also reasoned that time lost awards are not subject to RRTA taxes because personal injury awards are not subject to federal income taxes, or to payroll taxes under the Federal Insurance Contributions Act (FICA), 26 U.S.C. §§3101 *et seq.*, the statute which funds Social Security benefits. 437 S.W.3d at 212.

Burlington N. Santa Fe Ry, Co., 837 N.W.2d 532, 540 (Neb. 2013) ("Based on the definition of compensation as stated in the RRA and RRTA and the agencies' interpretations found in federal regulations, we conclude that time lost is compensation that is subject to taxation.").

More recently, the Pennsylvania Superior Court has rejected *Mickey*'s view that the calculation of benefits under the RRA has no bearing on the taxation of compensation under the RRTA. *Liberatore v. Monongahela Ry. Co.*, 140 A.3d 16, 29 (Pa. Super 2016) ("Although the *Mickey* Court attempted to disassociate the RRA and RRTA, we find the statutes are inextricably intertwined, and must be considered *in pari materia*. Indeed, without the benefits provided for in the RRA, there would be no need for the taxing provisions of the RRTA.").

D. The Split Among the Lower Courts Means that When a Time Lost FELA Award is Made, the Applicability of the RRTA Depends on the Jurisdiction Where the FELA Suit is Brought.

The *Phillips*, *Heckman* and *Liberatore* courts agree with the position of the IRS and RRB that time lost payments constitute compensation for the purpose both of calculating benefits and levying taxes. The court below and the *Mickey* court reject the Government's position. Railroads are caught in the middle.

The split of authority puts railroads in a difficult position. Each year the largest railroads pay substantial sums to injured employees under FELA. When these payments include awards for time lost, the Government requires the railroad to collect and pay amounts to cover both the employer and employee

portion of the payroll taxes on those awards. FELA plaintiffs typically oppose the railroad making such deductions and payments. Currently, resolution of these disputes depends on the jurisdiction where the suit was filed.

This problem is particularly acute in the Eighth Circuit. There is a split among the highest courts of three states within the Eighth Circuit. And, with the decision below, the Court of Appeals now agrees with one of those courts and is in conflict with the other two. As a result, different results would obtain on this issue in federal courts in the Eighth Circuit on the one hand, and in at least two states within that circuit on the other. As the petition explains, BNSF, which operates throughout the Eighth Circuit, directly faces this conflict. *See* Pet. at 21.

The Union Pacific Railroad, another large freight railroad, also operates throughout the Eighth Circuit, including in the three Eighth Circuit states that have addressed this issue. Two other large freight railroads operate in both Iowa and Missouri. Amtrak, which operates intercity passenger rail service in 46 states, including Missouri, Iowa and Nebraska, is covered by FELA and the railroad retirement system. These railroads all face the same untenable situation as BNSF.

The problem is not confined to one region of the country or a few railroads. This issue is pending before appellate courts in Illinois, *Munoz v. Norfolk S. Ry. Co.*, No. 1-17-1009 (Ill. App.), and Alabama. *Norfolk S. Ry. Co. v. Williams*, No. 2160823 (Ala. App.). Multiple large railroads operate in those states; the two largest eastern railroads, Norfolk Southern and CSX Transportation, operate in those states as well as Pennsylvania and Missouri. Regardless of how those

pending appeals are resolved, eastern railroads will also face conflicts in the states where they operate.

E. The Split Among the Lower Courts Raises Questions About the Taxability of Other Payments that are Made to Railroad Employees for Periods When They Did Not Render Services.

The uncertainty created by the split among lower courts has implications that go beyond the tax treatment of time lost awards under FELA. The court below held that time lost FELA awards are not subject to RRTA taxes because they are not made for a period of time when the employee actually rendered services to the employer. Pet. App. 20a. Time lost FELA awards are not the only payments made to railroad employees for time periods when services were not rendered.

Data reported by the largest railroads to the Surface Transportation Board show that in 2016 railroad employees were paid over $1.9 billion in vacation, holiday, and sick pay (and pay for other periods when the employee did not perform services) (available at https://www.stb.gov/econdata.nsf/dc81d49e325f550a852566210062addf?OpenView). This amount—which greatly exceeds the amounts awarded each year as pay for time lost under FELA—also represents payments made to employees for time during which they did not actually perform services. If FELA time lost awards are not subject to RRTA taxes because they are payments for time periods during which services were not actually rendered, there is no logical reason why other payments for time periods during which services were not rendered—like vacation, holiday, and sick pay—also would not be taxable. At very least, the decision below raises the question whether large sums of money regularly paid to railroad employees are

subject to RRTA taxes. Many millions of dollars in payroll taxes would be at stake if these kinds of payments were not subject to RRTA taxes.

The divergent positions taken by the lower courts leave uncertainty in two areas of law that this Court has long admonished require uniformity. First, taxing statutes require uniform interpretations. Otherwise, similarly situated taxpayers would be obligated to pay different amounts on the same kind of income, or otherwise be treated differently on tax matters. *See Thor Power Tool Co. v. Comm'r,* 439 U.S. 522, 544 (1979).

FELA also demands uniform interpretation. Congress' very purpose in enacting FELA was to subject railroads and their employees to "a national law having a uniform operation throughout all the states," by fixing "one rule in all the states" regarding railroad "employer's liability for personal injuries." *N.Y. Cent. R.R. v. Winfield,* 244 U.S. 147, 150 (1917). *See also Brady v. Southern Ry. Co.*, 320 U.S. 476, 479 (1943) (explaining the need for "a uniform federal rule" so that all litigants "receive similar treatment in all states"). Until resolved, the split among the lower courts, which is only likely to grow wider, will result in FELA plaintiffs in different jurisdictions who receive the same award, having different tax liability, and, therefore, taking home different amounts.

For these reasons, AAR supports BNSF's petition seeking "definitive guidance . . . on the validity of the IRS's interpretation that the pay for time lost is subject to employment taxes under the RRTA." Pet. at 4. Only this Court can provide this much-needed guidance.

CONCLUSION

For the foregoing reason the petition should be granted.

Respectfully submitted,

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